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IN THE

Supreme Court of the United States

October Term, 1966

No. 674

W. FRANK SMYTH, JR.,
DIRECTOR, VIRGINIA DIVISION OF CORRECTIONS,
Petitioner,

v.

WILLIAM HOWARD,
Respondent.

Petition for a Writ of Certiorari to the Judgment of the United States Court of Appeals for the Fourth Circuit

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PRELIMINARY STATEMENT

W. Frank Smyth, Jr., Director of the Virginia Division of Corrections, prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Fourth Circuit entered on August 9, 1966. A petition for rehearing was denied by that Court on September 28, 1966.

OPINIONS BELOW

The initial opinion of the United States District Judge will be found in Appendix II to this brief. The opinion

of the United States Court of Appeals for the Fourth Circuit, which is not yet reported, will be found in Appendix I to this brief.

THE JUDGMENT

Under ordinary circumstances, a certified copy of the judgment, in lieu of the mandate, is forwarded by the Clerk of the United States Court of Appeals for the Fourth Circuit to the Clerk of the District Court thirty days after the announcement of the opinion. This case was decided on August 9, 1966. On August 26, 1966, the Clerk advised counsel that, at the direction of Judge Sobeloff, the judgment, in lieu of a mandate, was that day transmitted to the Clerk of the United States District Court for the Eastern District of Virginia in Richmond. This is most unusual. A motion to recall the mandate was filed on September 1, 1966. A petition for rehearing en banc was filed on September 8, 1966. The motion to recall the mandate was denied on September 13, 1966. On September 28, 1966, the petition for rehearing en banc was denied by six of the seven Judges of the United States Court of Appeals for the Fourth Circuit.

In accordance with the mandate, the District Court ordered that Howard be released from the maximum security section of the penitentiary, and this order has been complied with by the Director.

JURISDICTION

The jurisdiction of this Court to issue the writ of certiorari in the case involved is grounded upon 28 U.S.C., § 1254 (1).

STATUTES INVOLVED

28 U. S. C., Section 1254(1)
Section 53-252, Code of Virginia

QUESTION PRESENTED

Did the United States Court of Appeals for the Fourth Circuit Err in Directing the Release of Howard from the Maximum Security Unit at the Virginia State Penitentiary When in Doing So It Completely Ignored the Evidence Presented to the District Judge and His Findings of Fact and Conclusions of Law, Which Were Amply Supported by the Same?

STATEMENT OF THE CASE

William Howard, the prisoner, was confined in the maximum security unit of the Virginia State Penitentiary, sometimes known as "C" building. He was placed in "C" building on August 7, 1962.

It appears from the record that on that date he met with the Superintendent, at that time W. K. Cunningham, Jr. (now Director, Division of Corrections), and C. C. Peyton, Assistant Superintendent of the Penitentiary (now Superintendent of the Penitentiary). At that time he represented to the Superintendent that he was a Muslim, that he represented forty prisoners, and that they desired to hold Muslim religious services. The Superintendent asked for the names of the other prisoners. The petitioner refused to disclose their names, and he was placed in "C" building.

Mr. Cunningham's description of "C" building is set forth below:

> [DEP. 6-14]
>
> "Q Now, would you explain to us what that is, and what limitations go with it?"
>
> "A 'C' Building is a separate portion of the Virginia State Penitentiary. It would be known in penalogical circles as segregation. It is separated by a wall, and prisoners are assigned by the superintendent, or assistant superintendent making his recommendation

to the superintendent, on the basis of their conduct in the prison.

"Men who are troublemakers, agitators, men who refuse to work or to cooperate with the authorities, those who are guilty of crimes of violence in the penitentiary, or who are considered potentially guilty, may be assigned to segregation or 'C' Building by the superintendent.

"The usual routine is for a man to go before the Disciplinary Court of the penitentiary. They make their recommendations through the assistant superintendent to the superintendent, but in some cases, the superintendent himself acts without recommendation from others."

"Q Now, what are the differences in the privileges that a prisoner enjoys in the segregation section of the 'C' Building, as opposed to the general routine of the prison?"

"A A prisoner in 'C' Building does not work. He doesn't have any radio outlet in the cell. He doesn't go to the main recreation field of the penitentiary. He has his own recreational area. Naturally, the recreation area is small, so you don't have the athletic program that you have in the main part of the prison. But the main difference is that the prisoner doesn't work and receives no pay for any work while he is assigned to 'C' Building."

"Q Now, is the 'C' Building the same as what we might term solitary confinement?"

"A No, sir."

"Q What is the difference between 'C' Building or segregation, and solitary confinement?"

"A Solitary confinement is punishment. 'C' Building is segregation, or separation from other prisoners. Often prisoners who go to punishment will then go from punishment to segregation, but a man in segre-

gation is not necessarily on punishment. He may consider it punishment, and we have no control over that, in the same way a youngster may feel it is being punished by going to school; but it is not punishment in the strict sense of the word."

"Q Now, how many meals a day do the prisoners get in segregation?"

"A Two."

"Q And how many in the normal routine of the prison?"

"A Three, except on holidays."

"Q How about television privileges?"

"A No television privileges in—"

"Q In either place?"

"A In segregation."

"Q But there is in the general routine of the prison?"

"A Yes."

"Q How about rights to mail letters?"

"A No difference."

"Q Rights to receive visitors?"

"A No difference."

"Q How about is there any effect, or difference in the effect on good time?"

"A No."

"Q Do you accumulate them the same in both?"

"A That is right."

"Q How about right of parole? Is there any difference?"

"A The Parole Board, as a matter of policy, does not hear prisoners in 'C' Building. That is their policy, not ours. And if they wanted to start hearing them, we would not object."

"Q So a man, in order to be considered for parole, would have to be moved from 'C' Building to the general routine of the prison?"

"A Yes."

"Q How about the rights to look at newspapers or magazines? Any difference in those?"

"A No."

"Q In other words, each case, they are allowed to have newspapers and magazines made available to them?"

"A To subscribe. Now, we have magazines in our main prison library which are accessible to the general population, which would not be accessible to a man in segregation; but a man in segregation can subscribe."

"Q But he can't go to the general library?"

"A No."

"Q Are there any motion pictures available for prisoners in the general routine of the prison?"

"A Yes."

"Q Are the prisoners in 'C' Building, or segregation, permitted to go to the movies?"

"A No, sir."

"Q Are there any opportunities for educational benefits available to the general prisoners?"

"A Yes."

"Q Are they likewise available to the prisoners in 'C' Building?"

"A In the sense that a prisoner can request, through channels, to have books made available for him to study in 'C' Building. He does have that available to him. He is not released from 'C' Building to attend classes."

"Q Are there classes in the prison for the general prisoner?"

"A Yes."

"Q There is no opportunity for a prisoner in segregation to earn any money for cigarettes or candy, or anything like that?"

"A No. Except those who—now, there is one exception. Certain prisoners in 'C' Building might be assigned to the kitchen in 'C' Building. Certain prisoners might be assigned as barbers in 'C' Building. If they do work of that sort, then they do receive per diem."

"Q How about the opportunity to take a bath? Is that available on the same basis to the ones in the 'C' Building, as would be true in the general routine of the prison?"

"A Yes. Each cell in 'C' Building has a wash basin. The water is kept turned on."

"Q How about to take a shower or something like that?"

"A The shower would not be available daily, no."

"Q In the 'C' Building?"

"A It is available once a week."

"Q How about the general prisoners? Are they available daily to them?"

"A Yes. Now, let me amend that. During certain times of the year, they are available to the general population. Real hot weather. They are made available more during hot weather than in colder weather."

"Q But a man that performs some sort of a manual labor in the general routine of the prison, sometime before dinner or going to bed that night, would there be an opportunity to him to take a shower?"

"A Yes."

"Q On a daily basis?"

"A Yes. If he were assigned some unusually dirty job and wanted permission to take a shower. We believe

that cleanliness is next to Godliness, and we let them have permission."

"Q But that is not true for those in segregation?"

"A No; because they don't work in unusually dirty work. They don't do any work at all, and they can wash up from a wash basin in their cells ten times a day if they want to."

"Q Now, what about use of a typewriter? Would that be equally available to both?"

"A I just don't remember that. I don't recall the question having come up. Mr. Peyton can probably answer that. The use of a typewriter anywhere in the institution is by special permission only. A man can't just have a typewriter sent in to him without getting permission to do it."

"Q What about medical services? Are they equally available to both?"

"A Yes."

"Q How are personal effects of the prisoners handled?"

"A I don't quite understand."

"Q In other words, if a man comes into the prison, does he have any place he can keep personal effects? Maybe, like letters that come from his family, or whatever little treasures he might have that might not be dangerous?"

"A Yes, sir."

"Q And what sort of provision is made for that, for the general routine prisoner?"

"A. He keeps these things in his cell."

"Q Well, now, the prisoners in segregation are permitted to keep those same things?"

"A Yes."

"Q Do they have the same type of containers, or whatever you have to keep them in?"

"A My recollection would be that, if anything, the containers would be a little better in 'C' Building, the storage places for them, because in 'C' Building each man has his own cell. In the main population, we have to double up in many cases."

"Q The cells in the 'C' Building, are they padlocked, or what?"

"A Certain cells are padlocked. Not all."

"Q What would be the reason for padlocking the cell?"

"A Many prisoners assigned to 'C' Building request that they not go out on the yard for exercise, request to be padlocked in their cell. They claim that they for example, they might be afraid of some other prisoner in 'C' Building. If they ask that, we do padlock them in their cell. They don't leave them, except for their baths. Their meals are brought to them.

"In other cases, a prisoner might violate rules in 'C' Building. He might try to kill another prisoner in 'C' Building, for example. In a case of that sort, he would be padlocked in his cell."

"Q But absent such reasons as those, he wouldn't be padlocked, and he could come in and out within a certain area?"

"A When he is released from the cell to go to the exercise yard. Now, there is no visiting between cells when the men are all in the cell block, but the cells are not padlocked. They are the usual prison locking devices to lock the cells."

"Q Well, now, in the general routine of the prison, do the prisoners have an opportunity to visit between cells at certain times?"

"A At certain times."

"Q But that would not be true in segregation?"

"A No."

"Q Now, how about the rights to use the commissary store and purchase things? Are those benefits the same in the 'C' Building as they are to the general routine prisoner?"

"A No. The prisoners in 'C' Building can order what they want from the commissary once a month. They write up an order, which is taken over and filled. Prisoners in the general population have access to the commissary."

"Q Does the prison have any kind of athletic teams, anything where they engage in what we call intramural fashion?"

"A Yes, sir."

"Q And would the prisoners in 'C' Building have any right to engage in those athletic sports and be on any of those teams?"

"A No, sir."

While it is true that the Parole Board does not hear prisoners from "C" building, the Parole Board does review each prisoner's case as required by § 53-252 of the Code of Virginia. This particular provision of law does not require the Parole Board to interview each prisoner at the time of the annual review. Moreover, there is no evidence in the record from the Parole Board which indicates that they refuse to consider a "C" building prisoner eligible for parole.

Prisoners are permitted to work and earn money in "C" building. This is somewhat limited, however, in that the only persons working are those in the kitchen and the barber shop.

Prisoners in "C" building receive only two meals per day, but the rations are in excess of the normal meals.

It is true that prisoners in "C" building are not permitted radio and television, nor do they have the right to view movies.

The prisoners are permitted to engage in outside athletic activities. A recreation yard of considerable size is provided, although, of course, it is not as large as the athletic fields available for the general population.

Prisoners do have access to books from the library and can take correspondence courses if they so desire. They are not permitted to attend the prison school.

Prisoners in "C" building can order from the commissary only once a month.

Prisoners in "C" building can take a bath as often as they desire, as they have running water in each cell. They are permitted to take a shower bath once a week. This is the same treatment accorded other prisoners in the penal system under similar circumstances. It is true that prisoners in "C" building are restricted to the maximum security unit and consequently cannot mingle with the members of the main population. Prisoners in "C" building are not permitted to visit prisoners in other cells.

Howard does not contend that he was placed in "C" building because he was a Muslim and desired to hold Muslim services. He admits that he was placed there because he refused to give the Superintendent of the Penitentiary a list of the names of the persons whom he represented. Mr. Cunningham described the meeting in question as follows:

> [DEP. 14-15]
>
> "Q Now, can you tell us the reasons for which Mr. Howard is confined in the 'C' Building in segregation?"
>
> "A As I recall this case, he told me that he had a group of approximately forty prisoners whom he

represented, and that he wanted to meet with. He wanted to organize them. I asked him to give me the names of those prisoners, and he refused to do so. I told him that I did not permit prisoners to organize for any purpose whatsoever, and since he was acting as their leader, I was placing him in segregation, for his good, and for the good of the institution."

"Q Well, now, did he tell you that he was a member of this religious sect called Islam, or Black Muslim?"

"A I frankly don't recall whether we discussed that at all. We might have. I am not saying we didn't, but I just don't recall whether he mentioned that or not. Now, actually, the point would have been immaterial. If he had told me he was going to organize prisoners for any purpose, whatsover, the results would have been the same."

* * *

[DEP. 27-29]

"Q Now, going back to the meeting that you had with Howard with respect to the fact that he wanted to sort of act as a leader, you say, for some other, approximately, forty men?"

"A Yes."

"Q And didn't Mr. Howard indicate to you that he was a Black Muslim or member of this Islam faith, and that these men that he was acting as leader for, were similarly a member of that religious faith?"

"A As I said, I don't recall the details of our conference. I couldn't swear that he did, or that he didn't. I just don't remember, because I interview thousands of prisoners, but as I also said, the point would have been immaterial. It would have been completely irrelevant. The fact that he wanted to organize a group of forty prisoners and act as their leader in any capacity whatsoever, that was what governed my action."

"Q Well, in other words, to make sure that I have it straight, if Mr. Howard had come to you and represented to you that he was a member of the Black Muslim religion, and that there was some other forty prisoners who were similarly members, and that they wanted to hold a religious service, at some time, then, based on that alone, you would then confine him to the segregation of the prison?"

"A If he had indicated that he was their leader and he was speaking for them, and he wanted to organize them as a group, yes, I would have also, as I did, make the effort to find out who these forty men were that he was supposedly representing."

"Q But even if he—in other words, you are not denying that he told you that this was for the religious purpose of practicing this Black Muslim religion?"

"A I am neither affirming nor denying that he told me that, I just don't remember."

"Q For the purpose of answering my question, let's assume that he did tell you that, then even though he told you that, that would have still, to your way of thinking, been reason enough to send him to the segregation section?"

"A That is correct, because he was always such a liar that I couldn't have believed that that was his real reason. He could say he wanted to organize them for religious purposes and actually have it for an entirely different purpose. The fact that he was organizing and leading, those were the two governing factors in my decision."

"Q Well now, it wasn't because he was a liar or anything that you sent him to the 'C' section?"

"A No, if we did that, I am afraid 'C' section would be overflowing."

"Q I trust it would. So, this meeting that we are talking about where Mr. Howard told you that he

was acting as leader and was organizing some forty men, and he was on account of that, assigned to 'C' section, was that on the fifteenth day of August, 1962?"

* * *

[DEP. 53-55]

"A The part that refers to his appearing before me for an interview, or discussion is true. The part about his discussion of the religion of Islam and the practice of it, might or might not be true. As I said, I don't recollect whether we actually referred to any religious sect at all. The part where he indicates that he was a victim of a rule that was not uniformly applied is false. Now, I forget just the exact phraseology, but something about not being uniformly applied."

"Q But did you deny his request to hold some type of worship service for the Black Muslim religion in the prison?"

"A I may or may not. I don't remember his making such a request. As it turned out by my placing him in 'C' Building, he certainly couldn't carry on a religion, meet as a religious group, but I don't remember whether he made that specific request or not."

"Q Well, Mr. Cunningham, what was the purpose of Mr. Howard coming before you? I mean, wasn't the purpose of his coming to that meeting was to explain to you he was a member of that religious group and that there was some forty others, and they wanted to have a religious service? Now, wasn't that the whole purpose of the meeting?"

"A I don't know what his purpose was. That is something only he can answer. But I can't read his mind. It could very well be that. But the part that I considered important, and the part that stuck in my mind for that reason is the fact that he was representing another group of prisoners, and they wanted to act as a group, and he was their leader, and I placed their

leader where he couldn't get in contact with his group, on the theory that if you cut off the head the body dies, as it turned out to be."

Mr. Peyton described the conference as follows:

"Q Now, were you present when Mr. Cunningham was in conference with Mr. Howard back on August 7, 1962?"

"A Yes, sir."

"Q I am now asking you what your recollection is as to whether or not Mr. Howard indicated to you that he was a member of the Black Muslim religious sect?"

"A I don't recall that there was any reference to this sect at that particular conference. There may have been, but I don't recall as to whether he referred to that sect or not. This has been sometime ago, and there was nothing in writing. No one took notes, and I just don't recall whether he did or he didn't."

"Q Well, if he states that the purpose of the meeting was to secure rights for him and a group of others to worship this religion of Islam or Black Muslim, would you be in a position to deny that?"

"A I couldn't deny or affirm that, because I don't recall what was said. I do recall the reason for him being put over there."

"Q What was the reason for Mr. Howard being put in 'C' Building?"

"A Well, when he requested Mr. Cunningham to talk to a group of prisoners and act as their leader, Mr. Cunningham told him at once that he would not consent to that, he would not agree with it. That he wasn't going to organize any group there."

"Q And then?"

"A He ordered him to 'C' Building. And he was taken to 'C' Building immediately.

"Q And he has been in 'C' Building, I think, ever since?"

"A Yes, sir."

"Q Now, assuming that Mr. Howard testifies that he did explain to you that he was a Muslim, a member of this religion of Islam, and that he wanted rights for himself and a group of other prisoners who were members of the same religious sect to meet and worship their religion, now I realize you don't remember, so assuming that this is the fact, that is what he told you, then that was the reason that he was sent to 'C' Building; was it not?"

"A The reason he was sent to 'C' Building is because he refused to tell Mr. Cunningham what his reasons for organizing this group was, and he refused to tell Mr. Cunningham who the people involved were. That was the reason."

"Q Well now, a moment ago you stated that you didn't know whether he told you the reason for organizing was this Black Muslim religion or not?"

"A That is right. I didn't recall even hearing the word mentioned."

Both the Director of the Division of Corrections and the Superintendent of the Penitentiary testified that it was necessary to control the organization of groups to prevent escapes, riots, and other illegal activities (Tr. 25).

ARGUMENT

The Director will demonstrate on the following pages that the court below has ignored established principles of law in reaching its decision in the premises. The Court has cited no authority for its interference in the orderly administration of the penal system. It ignored the evidence presented to the District Judge and sat in effect as a jury

in reaching its conclusions in the premises. The court below has, therefore, exceeded its jurisdiction in the premises, and for that reason, its decision should be reversed.

The Court Erred in Directing That the Prisoner Be Transferred from the Maximum Security Building at the Virginia State Penitentiary into the General Population of the Penal System.

In the opinion of the court below it is stated:

> "We hold only that where a prisoner, acting not surreptitiously but frankly and candidly through proper channels, requests arrangements for religious services but refuses to divulge the names of the other interested prisoners, and as a result is summarily confined in the maximum security ward for a period of years, the only reasonable conclusion is that he is being arbitrarily punished."

This supposition is not supported by the record. It is admitted by Howard himself that he was placed in "C" building because he refused to give the penal authorities the names of the members of his group. Howard testified as follows:

> "Q Did you talk with Mr. Cunningham with respect to whether or not there were others equally interested in holding these worship services at the prison?"
>
> "A Yes, sir, I did, and he tried to get the names of these others from me but I declined, I refused to give it to him."
>
> "Q Mr. Howard, why did you refuse to give him the names?"
>
> "A Well, I feel that they would take some sort of disciplinary actions against them."
>
> "Q Now, what happened to your request about holding these religious services?"

"A Well, it was denied and I was immediately confined in the C Building Block of the penitentiary." (Tr. 10)

Here, we see that the prisoner himself does not suggest that he was placed in "C" Building because he was a Black Muslim or because he was seeking to hold religious services. He admits that he was placed in "C" Building because he refused to divulge the names of the members of his group.

Likewise, Mr. Cunningham testified as to the reason for placing Howard in "C" Building:

"Q Did you place Mr. Howard in C Building because he was a Black Muslim?"

"A No, sir."

"Q Was he placed in C Building because he wanted to hold religious services of the Black Muslim?"

"A No, sir."

"Q Can you tell us why you put him in C Building?"

"A Placed in C Building because he represented himself a leader of a group of prisoners and he had certain demands he wanted to make on me and he refused to name the prisoners that he said he represented, and for that reason I placed him over in segregation."

"Q Now, with regard to the demands which he made upon you, do you recall what these demands were, sir?"

"A I don't recall we ever got to that point, in other words, as soon as he refused to tell me the names of the people that he represented to the best of my recollection that ended the matter right there." (Tr. 19-20)

In the opinion of the court below, it is stated:

> "If a Protestant or Catholic or Jewish inmate had expressed a desire to worship with others of his faith, there can be little doubt that the prison officials would have been disposed to honor the request; and if for any reason this was thought impracticable, it can hardly be supposed that the mere making of the request or even the refusal to reveal the identity of other prisoners sharing in this concern would have lead to punishment by years of confinement in the maximum security ward."

In the first instance, the penal authorities have emphasized that confinement in "C" Building is not punishment. Here, we have an administrative interpretation of the laws applicable to the operation of the Virginia penal system. In the recent case of *Peyton* v. *Williams*, 206 Va. 595, 145 S.E. 2d 147, the Supreme Court of Appeals of Virginia commented as follows:

> "The elementary rule of statutory interpretation is that the construction accorded a statute by public officials charged with its administration and enforcement is entitled to be given weight by the court. The legislature is presumed to be cognizant of such construction. When it has long continued without change the legislature will be presumed to have acquiesced therein. *Smith* v. *Bryan*, 100 Va. 199, 204, 40 S.E. 652. See also *Commonwealth* v. *Appalach. El. Power Co.*, 193 Va. 37, 45, 68 S.E. 2d 122; *Commonwealth* v. *Radiator Corporation*, 202 Va. 13, 19, 116 S.E. 2d 44; *Miller* v. *Commonwealth*, 180 Va. 36, 42, 21 S.E. 2d 721; 82 C. J. S. Statutes, § 359 (a) and (c), pp. 761-781; 50 Am. Jur. Statutes § 319, pp. 309-311; 2 Sutherland on Statutory Construction, 3rd Ed., §§ 5103-5105, pp. 512-517."

It is, therefore, clear that the court below was in error when it held that confinement in "C" building is punishment.

Moreover, it is clear that if an individual of any faith had acted as Howard did, he would have been placed in "C" building. In this connection, Mr. Cunningham testified as follows:

"Q Now, if a Jewish boy came to you and told you that he wanted some type of Jewish service held at the Virginia State Penitentiary, where he and other members of the Jewish faith could attend, would he be referred to the Catholic chaplain or Protestant chaplain?

"A If a Jewish boy came to me, as Howard did, and said he represented that group of 40 other prisoners and we have a certain request or demand we want to make of you and I asked him for the names of those other prisoners and he refused to give them to me, he would be treated exactly the same as Howard was treated."

"Q Is that because there is no Jewish chaplain at the penitentiary?"

"A No, sir."

"Q Well, can you explain to the Court you would treat a Catholic boy one way and a Jewish boy another?"

"A Your question didn't bring that out.

"Now, if a Catholic boy came to me, or a Protestant boy came to me, saying he represented a certain group of prisoners and refused to give me their names, he would be treated the same way if he had certain demands to make.

"This treatment is based on the fact that a man is a leader of a group of prisoners and we cannot have leaders of prisoners taking action on their own part because when groups of prisoners start acting then you have disturbances and riots and all sorts of trouble."

(Tr. 24-25)

* * *

Q So your contention is regardless of the purpose or the reason, if he comes to you and says, I want to get together with some others on a group basis to do anything that is sufficient basis for throwing him in C Block?"

A If he refuses to tell me who the others are, yes." (Tr. 27)

It is, therefore, obvious that the question of religious services is not pertinent to this inquiry. As pointed out by the District Judge in his opinion:

> "The Court finds that Howard was placed in the security unit because he represented himself to be a speaker for about forty other prisoners and he refused to give the names of the other prisoners. He frustrated the possibility of the prison officials investigating the situation to determine for what purpose the prisoners wished to meet and whether or not his request was bona fide. *He was not placed in the security unit because of his religious beliefs.*" (Emphasis added)

On page 2 of the opinion of the court below, it is stated that prisoners in "C" building do not have access to the library, are not permitted to attend educational classes, and are allowed to bathe only once a week. Mr. Cunningham testified in connection with this matter that prisoners are permitted to subscribe to magazines and newspapers and can request books to study in "C" building (Dep. 9-11). There is running water in each cell, and a prisoner can wash as often as he desires.

On page 4 of the opinion, it is commented that there has been no contention that Howard created any disorder or other difficulty in the prison before his request for religious services. This was not a point of importance before the District Court. We pointed out in our petition for rehear-

ing filed in the court below that, if this be true, a hearing should be held to ascertain this man's previous prison record. It is not in this record, and counsel for the Director does not believe that it is proper to present additional evidence in a petition for a writ of certiorari.

It is, therefore, obvious that the court below is in error in holding that Howard was placed in the maximum security building at the Virginia State Penitentiary because of his religious beliefs. He was placed there because he refused to divulge the names of a group of prisoners who he claimed to be leading.

It is a well known fact that the operation of a penal system is a difficult job at best. Mr. Cunningham and Mr. Peyton, the Director of the Division of Corrections at the present time and the Superintendent of the Penitentiary, respectively, have had long years of experience in the operation of penal institutions, and their judgment should be accorded great weight, for they are aware of the problems of maintaining order in a prison system.

We have seen in recent months prison riots and problems in penal systems outside Virginia. It is because of the efforts of these experienced administrators that similar situations have been avoided in Virginia.

Here, the court below ignored the judgment of these two experienced men and substituted its judgment for the control and operation of the Virginia State penal system. In doing so, it has invited a deluge of lawsuits involving the manner in which prisoners are treated and confined in prisons throughout the Fourth Judicial Circuit.

A contrary decision was reached by the United States Court of Appeals for the Seventh Circuit in *Walker* v. *Pate*, 356 F. 2d 502. That court pointed out that it was not going to get involved in the administration of the penal systems

in its circuit, and, in a concisely worded opinion by Judge Duffey, put the prisoners on notice that it would not interfere with penal administrators. Likewise, the United States Court of Appeals for the Ninth Circuit has declined to interfere with the orderly operation of the penal systems located within its jurisdiction. *Hatfield* v. *Bailleaux,* 290 F. 2d 632.

The Court below has ignored its own decisions in *Childs* v. *Pegelow,* 321 F. 2d 487, and *Roberts* v. *Pegelow,* 313 F. 2d 548. Moreover, it has ignored the provisions of Rule 52(a) of the Federal Rules of Civil Procedure, which rule states that the findings of fact made by the District Judge are binding on the Circuit Court of Appeals unless they are clearly erroneous. It is quite clear that the findings of the District Judge are not clearly erroneous and moreover that there is ample evidence to support them, specifically including the testimony of the prisoner himself.

The court below has consistently held that the findings of a District Judge will not be disturbed unless they are clearly erroneous. In this case, however, it has ignored its previous decisions. *Bolling* v. *Cunningham,* 303 F. 2d 659; *Post* v. *Boles,* 332 F. 2d 738; *Crabtree* v. *Boles,* 339 F. 2d 22; *James* v. *Boles,* 339 F. 2d 431; *Root* v. *Cunningham,* 44 F. 2d 1; and *Pannell* v. *Cunningham,* 302 F. 2d 633.

It cannot be overemphasized that the Director of the Division of Corrections is charged with the safekeeping of criminals convicted in the courts of the Commonwealth of Virginia. It is his job to see that these criminals serve the sentences imposed upon them, to attempt to rehabilitate these prisoners, and at the same time to protect the general public from this element of society. Moreover, it is the duty of the prison administrators to protect the prisoners from each other, as is exemplified by the testimony hereinbefore set forth in this petition.

It is quite clear that the prison authorities are not running a country club but an institution to protect the general public from the actions of convicted felons. This prisoner has remained in "C" building for quite some time. A review of the record before this Court indicates that the last time the Superintendent came to interview him to consider whether or not he should be released from "C" building, he refused to see the Superintendent. This was within Howard's rights.

The court below, however, has now held that although Howard declined to exercise his right of interview, he must be released into the general population of the penal system. This has been accomplished. Suppose, however, he gets into some type of difficulty and the Superintendent desires to return him to the maximum security section of the penitentiary or place him in meditation. Are the penal authorities required to go before the District Judge and get permission before taking any disciplinary action against this man? This presents some very serious questions in the minds of penal authorities, for the court below has plowed a deep furrow in new ground.

This is not a case wherein any constitutional right of Howard has been violated. He is a prisoner sentenced to serve a term of years in the penitentiary. While in the penal system, he is granted certain privileges, such as radio, television, an opportunity to work, an opportunity to secure an education, and recreational activities. These are all privileges and are not rights. The penal authorities endeavor to rehabilitate each prisoner, but if a prisoner declines to avail himself of these opportunities, the prison authorities cannot be criticized. The judgment of the men operating the penal system in Virginia cannot be criticized. There is no indication in this case that this prisoner has been denied the right

of access to the Court or any constitutional right guaranteed to him by the Constitution of the United States or the Constitution of Virginia. Indeed, a review of the opinion of the court below indicates that the Court has acted because certain privileges have been taken from this prisoner. It is interesting to note that the court below does not state from whence cometh its jurisdiction to direct a penal administrator to move a prisoner within the penal system, as the Court directs. It has just done so without citing any authority for its actions.

It is quite clear that the court below has ignored its own decisions in reaching its conclusion in the premises. There is ample evidence in the record to indicate that the factual matters as set forth in the Court's opinion are not supported by the evidence in the record. It is difficult to comprehend why the court below has decided to interfere with the orderly administration of the Virginia penal system. By doing so, it invites spurious complaints by disgruntled prisoners who have little to do but file pleadings in both State and Federal Courts. If this was a case wherein cruel and unusual punishment was being inflicted by the penal authorities, the State would have no complaint as to the Court's judgment. Here, however, there is no evidence to support the Court's opinion that this prisoner has been punished. He has merely been segregated from other inmates in the penal system.

This is a case of major importance. The decision of the court below is far-reaching, particularly when it is not supported by either law or fact. It is clear that the opinions of the Seventh Circuit and Ninth Circuit, hereinbefore mentioned, are in direct conflict with that of the court below. These two circuits have determined, quite wisely, that they know nothing about the operation of a penal

system and have left this to the judgment of experienced penal administrators. This would have been the appropriate action for the court below to have taken, had it exercised its judgment wisely.

CONCLUSION

The Director has demonstrated conclusively that the opinion of the court below is unfounded in either law or fact. The Court has ignored its own decisions and the decisions of other Circuit Courts of Appeal and is interfering with the operation of the Virginia penal system. Moreover, the Court has cited no authority for its entrance into this new field of law. This is a major step which could result in disastrous consequences, if courts are to substitute their unknowing judgment for that of experienced penal administrators.

It is for these reasons that we pray that this Court issue a writ of certiorari and reverse the judgment of the United States Court of Appeals for the Fourth Circuit in the premises.

Respectfully submitted,

ROBERT Y. BUTTON
Attorney General of Virginia

RENO S. HARP, III
Assistant Attorney General of Virginia

Supreme Court Building
Richmond, Virginia 23219

PROOF OF SERVICE

I, Reno S. Harp, III, one of the attorneys for the petitioner herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on this the 13th day of October, 1966, I served copies of the foregoing Petition for a Writ of Certiorari on the respondent herein, William Howard, by mailing the same in a duly addressed envelope, with first class postage prepaid, to his attorney, Wilbur C. Allen, Esquire, Attorney at Law, 1809 Staples Mill Road, Richmond, Virginia.

Reno S. Harp, III
Assistant Attorney General

APPENDIX I

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 10,441.

William Howard,
Appellant,

versus

W. Frank Smyth, Jr.,
Director, Virginia
Division of Corrections,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT RICHMOND
JOHN D. BUTZNER, JR., DISTRICT JUDGE.

(Argued May 4, 1966. Decided August 9, 1966.)

Before HAYNESWORTH, Chief Judge, SOBLEOFF, Circuit Judge, and FIELD, District Judge.

Wilbur C. Allen (Court-assigned counsel) [Allen, Allen, Allen & Allen on brief] for Appellant, and Reno S. Harp, III, Assistant Attorney General of Virginia, (Robert Y. Button, Attorney General of Virginia, on brief) for Appellee.

SOBLEOFF, Circuit Judge:

William Howard petitioned the District Court to order his release from the maximum security ward of the Virginia State Penitentiary, where he has been confined for four years, and to allow him to rejoin the rest of the prison population. After an evidentiary hearing, the District Court denied the requested relief, and Howard appealed.

Petitioner has been incarcerated in the Virginia prison system since 1956, having been sentenced for armed robbery, and is scheduled for normal discharge without benefit of parole on February 24, 1967. He has been confined in the maximum security ward, known as "C" building, since August 7, 1962.

The prison officials argue that confinement in the maximum security ward is not "punishment" but merely "segregation," and that therefore courts have no power to interfere with their decision to confine an inmate in maximum security. We do not accept this argument. While confinement in "C" building is not as harsh as solitary confinement, the District Court noted that the prisoner's "institutional privileges are severely limited," whether the confinement be described as "punishment" or "segregation." Prisoners in "C" building are not permitted to work and earn money; they are allowed only two meals a day, and are deprived of radio, television, and movie privileges; they do not have access to the library and are not permitted to attend educational classes; they are allowed to bathe only once a week, as opposed to daily bathing allowed other prisoners. It is also highly significant that the Parole Board declines to consider as eligible for parole any prisoner who is confined in the maximum security ward. These deprivations cannot be treated as insubstantial.

The circumstances which led to petitioner's confinement are as follows. In July, 1962, Howard, then a professing

Black Muslim, met with Prison Chaplain Cecil Gunn in an effort to secure for the Black Muslims among the prison inmates an opportunity to worship according to their religion's tenets. Howard reiterated his request to Chaplain Gunn on August 5, 1962, and on that occasion Gunn called C. C. Peyton, the assistant superintendent of the prison, and arranged for Howard to go to Peyton's office. Howard testified at the hearing in the District Court that in his conversation with Peyton he repeated his request that the prison permit religious services for Muslims. Peyton replied that he would have to discuss the matter with the prison superintendent, W. K. Cunningham, Jr.

Two days later, on August 7, 1962, Howard was called to Superintendent Cunningham's office, where he again voiced his desire for religious services for himself and others of the Muslim faith. Cunningham then demanded the names of the prisoners for whom Howard spoke. This demand Howard refused, explaining at the hearing that he feared that some sort of disciplinary action would be visited upon them. Cunningham then summarily ordered that Howard be confined in the maximum security unit of the penitentiary, where he has remained from August 7, 1962, to the present. Superintendent Cunningham admitted that he gave no hearing to Howard before ordering his confinement in the maximum security ward, although it was the customary practice to hold such a hearing. The only record of the reasons for this confinement is a notation, "transferred * * * by order of the superintendent for the good of the institution."[1] Nor is there any record or notation indi-

[1] Although Cunningham and Peyton testified at the hearing that they could not remember whether Howard had made a request for religious services, the District Court credited Howard's testimony and found that at the meetings with the prison officials "he expressed his desire to hold Muslim religious services * * *." If Howard's version were not accepted there would be no rational explanation of the superintendent's order.

cating the reasons for his continued confinement, despite the fact that the status of prisoners in the maximum security ward is reviewed every six months.[2]

There is no contention that Howard created any disorder or other difficulty in the prison before his request for religious services. There is testimony that in 1965, while in the maximum security ward, Howard became involved in a fight with two other prisoners and was disciplined accordingly. However, this one incident in 1965 was not cited in any record or at the District Court hearing as a reason for Howard's continued confinement in "C" building. The sole reason for ordering confinement in "C" building in August, 1962, and apparently for continuing this confinement, was Howard's refusal to disclose to the prison authorities the identity of the Muslim prisoners who desired religious services and for whom he professed to speak. As Superintendent Cunningham testified: "I placed their leader where he couldn't get in contact with his group, on the theory that if you cut off the head the body dies, as it turned out to be." This Draconian judgment was justified by the superintendent on the ground that he wished to prevent any trouble in the form of riots or escape.

Although prison officials may and should be alert to exercise their legitimate authority to prevent breaches of discipline, even this acknowledged broad authority may not be exercised to discipline a prisoner who merely expresses for himself and others a desire to worship according to their religious dictates. If a Protestant or Catholic or Jewish inmate had expressed a desire to worship with others of his faith, there can be little doubt that the prison officials would have been disposed to honor the request;

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2 Howard was interviewed every six months until June, 1965, when he refused to meet with the prison officials.

and if for any reason this was thought impracticable, it can hardly be supposed that the mere making of the request or even the refusal to reveal the identity of other prisoners sharing in this concern would have lead to punishment by years of confinement in the maximum security ward.

Perhaps the superintendent could justifiably have rejected the request for religious services, when he was refused the names of those interested in participating. That issue is, however, not before us. If the superintendent thought it pertinent to the processing of the request to have the names of the prisoners in whose behalf Howard interceded, he could readily have called upon those desiring to worship according to the Muslim faith to sign a list. If the list, or any other circumstances, convinced him that a dangerous situation might be created if services were allowed, the superintendent could then take appropriate steps to avoid the danger. There appears no just reason for casting the proponent of Muslim religious services, who had been guilty of no misconduct, into the maximum security ward for an indefinite period. The court will not countenance the arbitrary imposition of such serious disciplinary action where the assertedly offensive conduct bears so close a relationship to First Amendment freedoms.

We are not unaware that courts, including this court, have been reluctant to interfere with the conduct of prisons, with the enforcement of their regulations, or their discipline. See *Childs* v. *Pegelow,* 321 F. 2d 487 (4th Cir. 1963); *Roberts* v. *Pegelow,* 313 F. 2d 548 (4th Cir. 1963). Prison officials need not stand by if religious services are used to undermine their legitimate disciplinary authority. In this case, however, there is no intimation that Howard had such ulterior motives.

We hold only that where a prisoner, acting not surrepetitiously but frankly and candidly through proper channels, requests arrangements for religious services but refuses to divulge the names of the other interested prisoners, and as a result is summarily confined in the maximum security ward for a period of years, the only reasonable conclusion is that he is being arbitrarily punished. A prisoner is not bereft of all his rights. Included among those retained is an immunity from punishment for making a reasonable attempt to exercise his religion, even a religion that to some of us may seem strangely confused and irrational.

The judgment of the District Court is reversed and the case is remanded with instructions to order the prison officials to release Howard from the maximum security ward and to allow him to rejoin and remain with the rest of the prison population as long as his conduct conforms to proper prison regulations.

Reversed and remanded.

APPENDIX II

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

CIVIL ACTION
NO. 4260-M

WILLIAM HOWARD,

Petitioner,

v.

W. FRANK SMYTH, JR., Director
Virginia Division of Corrections,

Respondent.

Richmond, Virginia
November 16, 1965

Before: HONORABLE JOHN D. BUTZNER, JR., *United States District Judge.*

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THE COURT: Pursuant to the rules of the Court states from the bench its findings of fact and conclusions of law.

William Howard, a prisoner, instituted two suits against the prison officials of the Commonwealth of Virginia. In Civil Action 4366 Howard sought declaratory and injunc-

tive relief, to establish his right to observe the Muslim religion. In a letter dated August 6th, 1965 he advised the Court he wished to withdraw that action. It appeared that he no longer followed the Muslim religion. The Court granted the motion to dismiss the action without prejudice. In Civil Action 4260-M Howard sought relief in the nature of habeas corpus, first to discharge him from the security building, and second, to discharge him from the penitentiary.

The Court determined that a plenary hearing was required and appointed Mr. Wilbur C. Allen of the Richmond Bar to represent the petitioner. Mr. Allen has very conscientiously and ably discharged the obligation placed upon him by the Court. The Court expresses to him its deep appreciation for the services that he has rendered.

The facts show that in August 1962 the petitioner asked the prison chaplain for assistance in securing privileges for himself and others to conduct Muslim religious services. At that time he was a Muslim. The chaplain referred him to the assistant superintendent who sent him to the superintendent of the institution. He was granted an interview with both of these officials. He expressed his desire to hold Muslim religious services and he represented that he spoke for himself and for other prisoners. The superintendent asked who the other prisoners were. Howard refused to disclose their names. The superintendent directed that he be placed in the maximum security unit.

This unit is not looked upon by the officials of the prison as a punishment unit. It is a building in which prisoners are removed from the general penitentiary population. Their institutional privileges are severely limited. On the other hand it is not solitary confinement.

The right of prisoners to exercise their religious beliefs, including Muslim, has been recognized by the Courts. *Richy*

v. *Wilkins,* 335 F.2d 1 (2d Cir. 1964); *Sustre* v. *McGinnis,* 334 F.2d 906 (2d Cir.), *cert. denied,* 379 U.S. 892 (1964); *Childs* v. *Pegelow,* 321 F.2d 487 (4th Cir. 1963); *Sewell* v. *Pegelow,* 291 F.2d 196 (4th Cir. 1961) and 304 F.2d 670 (4th Cir. 1962); *Fullwood* v. *Clemmer,* 295 F.2d 171 (D.C. Cir. 1961); *Pierce* v. *La Vallee,* 293 F.2d 233 (2d Cir. 1961); *Banks* v. *Mavener,* 234 F. Sup. 27 (E.D. Va. 1964).

Therefore, the issue narrows. If the petitioner is being held in the security unit because of his attempt to worship, these cases would clearly establish his right to relief. On the other hand, the cases recognize that the prison officials have broad authority to govern the prison population and administer prison regulations consistent with the grave reponsibility placed upon them to prevent uprisings and riots and to rehabilitate those placed in their charge.

The Court finds that Howard was placed in the security unit because he represented himself to be a speaker for about forty other prisoners and he refused to give the names of the other prisoners. He frustrated the possibility of the prison officials investigating the situation to determine for what purpose the prisoners wished to meet and whether or not his request was bona fide. He was not placed in the security unit because of his religious beliefs.

The Court holds that the prison officials acted within the authority conferred upon them in placing Howard in a security unit.

The cause turns upon a factual situation and not upon the constitutional provision of the right to worship. For that reason the petition will be dismissed. The Court again expresses to Mr. Allen its appreciation for his services in representing the petitioner.

(Adjourned at 5:30 o'clock p.m.)